

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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New England Power Company)	D.T.E. 02-33
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**MOTION OF NEW ENGLAND POWER COMPANY
FOR A PROTECTIVE ORDER**

New England Power (“NEP” or the “Company”) hereby requests that the Department of Telecommunications and Energy (the “Department”) grant protection from public disclosure of certain confidential, competitively sensitive and proprietary information submitted in this proceeding in accordance with G.L. c. 25, § 5D.

I. INTRODUCTION

On May 17, 2002, NEP filed with the Department a Petition for Approval of Asset Divestiture, docketed by the Department as D.T.E. 02-33 (the “Petition”). The Petition seeks approval by the Department for the sale of NEP’s 9.95766 percent joint ownership interest in the nuclear power plant known as Seabrook Station (“Seabrook”), which is an operational 1,161-megawatt (“MW”) nuclear generating unit located in Seabrook, New Hampshire, to FPL Energy Seabrook, LLC (“FPLE Seabrook”) and findings concerning the divested assets as eligible facilities for exempt wholesale generator (“EWG”) status under Section 32 of the Public Utility Holding Company Act of 1935 (15 U.S.C. § 79z-5a) (“PUHCA”).

On July 1, 2002, the Department held an evidentiary hearing regarding the Petition. At the hearing, the Office of the Attorney General (“Attorney General”) and the Department issued record requests to the Company regarding information that was submitted confidentially, pursuant to a protective order issued in this docket on July 1, 2002 (see Tr.1, at 8), inter alia, the Company’s evaluation of the bids for Seabrook and the Companies’ analyses regarding the future market price of power that were used to evaluate the purchase power contract bids. The responses to these record requests contain proprietary, confidential and highly sensitive competitive information for which NEP requests protection from public disclosure.

For the reasons set forth below, and in accordance with the Protective Order already granted in this docket by the Hearing Officer, NEP requests that the Department issue a protective order to limit disclosure of the requested proprietary, confidential and highly sensitive competitive information to the Attorney General and the Department only.¹

II. LEGAL STANDARD

Confidential information may be protected from public disclosure in accordance with G.L. c. 25, § 5D, which states in part that:

The [D]epartment may protect from public disclosure, trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter. There shall be a presumption that the information for which such protection is sought is public information and the burden shall be on the proponent of such protection to prove the need for such protection. Where the need has been found to exist, the [D]epartment shall protect only so much of the information as is necessary to meet such need.

¹ NEP has executed a Non-Disclosure Agreement with the Attorney General whereby NEP will disclose competitively sensitive information to the Attorney General, subject to the Attorney General limiting review and distribution of the information to his staff and technical consultants, as noted in the Non-Disclosure Agreement.

In interpreting the statute, the Department has held that:

...[T]he burden on the company is to establish the need for protection of the information cited by the company. In determining the existence and extent of such need, the Department must consider the presumption in favor of disclosure and the specific reasons why disclosure of the disputed information benefits the public interest.

The Berkshire Gas Company et al., D.P.U. 93-187/188/190, at 16 (1994) as cited in Hearing Officer's

Ruling On the Motion of Boston Gas Company for Confidentiality, D.P.U. 96-50, at 4 (1996).

In practice, the Department has often exercised its authority to protect sensitive market information. For example, the Department has determined specifically that competitively sensitive information, such as price terms, are subject to protective status:

The Department will continue to accord protective status when the proponent carries its burden of proof by indicating the manner in which the price term is competitively sensitive. Proponents generally will face a more difficult task of overcoming the statutory presumption against the disclosure of other terms, such as the identity of the customer.

Standard of Review for Electric Contracts, D.P.U. 96-39, at 2, Letter Order (August 30, 1996). See also Colonial Gas Company, D.P. U. 96-18, at 4 (1996) (the Department determined that price terms were protected in gas supply contracts and allowed Colonial Gas Company's request to protect pricing information including all "reservation fees or charges, demand charges, commodity charges and other pricing information").

Moreover, the Department has recognized that competitively sensitive terms in a competitive market should be protected and that such protection is desirable as a matter of public policy:

The Department recognizes that the replacement gas purchases ... are being made in a substantially competitive market with a wide field of potential suppliers. This competitive market should allow LDC's to obtain lower gas prices for the benefit of their ratepayers. Clearly the Department should ensure that its review process does not undermine the LDC's efforts to negotiate low

cost flexible supply contracts for their systems. The Department also recognizes that a policy of affording contract confidentiality may add value to contracts and provide benefits to ultimate consumers of gas, the LDC's ratepayers, and therefore may be desirable for policy reasons.

The Berkshire Gas Company et al., D.P.U. 93-187/188/189/190, at 20 (1994).

On July 1, 2002, the Department recognized the highly sensitive nature of market information in the context of the sale of the Seabrook nuclear generation facility. The Hearing Officer of the Department in this docket, D.T.E. 02-33, approved the separate requests of NEP and J.P. Morgan Securities Inc. to protect information that related directly to the auction of the Seabrook, or pertained to the bidders or material facts concerning their bids in the context of that auction. New England Power Company, D.T.E. 02-33 (Motion of New England Power Company for a Protective Order) (approved July 1, 2002).

III. THE INFORMATION REQUESTED BY THE DEPARTMENT AND THE ATTORNEY GENERAL IS HIGHLY SENSITIVE AND WARRANTS PROTECTION FROM DISCLOSURE

NEP requests confidential treatment of specific information (responses to Record Requests DTE-1, AG-5, AG-6, AG-7, AG-8, AG-9) related to the auction process, bids received, and NEP's analysis of the Seabrook bids, including the evaluation of the purchase power contract bids, because the information is proprietary, confidential and highly competitively sensitive.

As indicated in New England Power Company's June 24, 2002 Motion for a Protective Order, disclosure of the confidential material responsive to the above-referenced requests would substantially harm the effectiveness and competitiveness of auctions for nuclear and other assets in New England. First and foremost, public release of this information could endanger the sale of Seabrook itself. JPMorgan, the auction agent for Seabrook, has treated the names of bidders, communications with the

bidders and bid information and analysis (the “Auction Information”) as confidential throughout the auction process. The Auction Information has been tightly controlled and has not been distributed outside of JPMorgan, jurisdictional public regulatory agencies, or, to the extent applicable, outside the management or counsel of the selling joint owners of Seabrook. All bidders were told that the auction process would be conducted in a highly confidential manner. The process was designed this way to encourage participation, promote competition in the bidding process, and maximize the proceeds from the bidding. Any disclosure now could significantly damage the Seabrook divestiture. Additionally, many bidders consider the structure and terms of their respective bids to be proprietary, confidential and competitively sensitive, so if the bids submitted or the analysis of the bids submitted in the Seabrook auction were to be released, competitors would become aware of such data and many bidders would likely be more reluctant to submit responses in any subsequent auction. Accordingly, the release of bid information or NEP’s analysis of the bids would potentially prejudice this auction and any future auction process and ultimately harm Massachusetts customers.

Consistent with precedent in this docket, NEP requests that the Department protect the above-referenced information from public disclosure for a period of 10 years from the date of the Department’s final Order in this matter. In addition, NEP requests an opportunity to petition the Department to maintain the documents as confidential for an additional 10 years if the Company should deem it necessary at the end of the initial 10-year period. Therefore, after a period of 10 years, unless the Department extends the period, the material in question will become public.

NEP recognizes that it is in the public interest to make submitted documents available to the public at some point in the future and believes that the ten-year period balances the interests of the parties to the sale of Seabrook with the interest in making the material public.

IV. CONCLUSION

NEP respectfully requests that the Department grant this Motion, and thereby issue a Protective Order for the information contained in the responses to record requests DTE-1, AG-5, AG-6, AG-7, AG-8, and AG-9, for a period of 10 years from the date of the Department's final Order in this proceeding; provided that NEP may request protected treatment for an additional 10 years at the end of the original ten-year term. This approach will allow the Department and the Attorney General to fully review the auction process and provide a mechanism to ensure that proprietary, confidential and highly sensitive auction information will remain confidential.

WHEREFORE, for the reasons set forth herein, NEP respectfully requests that the Department allow its Motion for a Protective Order.

Respectfully submitted,

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